HOMELESSNESS AND THE MISSING CONSTITUTIONAL DIMENSION OF FRATERNITY

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I. INTRODUCTION

The Constitution explicitly assures us that during peacetime, no soldier can be quartered in our home without our consent.[1] On the question of the actual availability of any sort of home in the first place, however, the federal Constitution[2] and many state constitutions[3] are less forthcoming. Many persons are, for one reason or another, chronically left involuntarily homeless.[4]

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[1] U.S. CONST. amend. III.

[2] The closest we have to an authoritative pronouncement on the question of any such federal constitutional right is the Court's announcement in *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) that "[we] are unable to perceive . . . any constitutional guarantee of access to dwellings of a particular quality. . . ."

[3] *See generally* Tucker v. Toia, 371 N.E.2d 449, 451 (N.Y. 1977) ("[i]n New York State, the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our [State] Constitution."). The court in *Tucker* adds that "[t]he legislative history of the Constitutional Convention of 1938 is indicative of a clear intent that State aid to the needy was deemed to be a fundamental part of the social contract." *Id.* In the housing assistance context, see *Jiggetts v. Grinker*, 553 N.E.2d 570, 572 (N.Y. 1990) (citing *Tucker*, 553 N.E. at 572) (program allowances forcing many families with minor children into homelessness as not meeting the relevant statutory standard). *See also* Hodge v. Ginsberg, 303 S.E.2d 245, 251 (W. Va. 1983) (granting petition for writ of mandamus directing relevant state agency to provide emergency shelter and other aid to incapacitated adults at "substantial and immediate risk of death or serious permanent injury"). By its terms, the writ in question in *Hodge* was thus relatively narrow and limited. At a state statutory level, see *Williams v. Dep't of Human Serv.*, 561 A.2d 244, 255 (N.J. 1989) (quoting 1984 state statute to the effect that "[i]t is the longstanding policy of this State that no person should suffer unnecessarily from cold or hunger, or be deprived of shelter") (citation omitted). *See also* L.T. v. New Jersey Dep't of Human Serv., 633 A.2d 964, 967 (N.J. 1993); B.N. v. Dep't of Human Serv., 670 A.2d 1111 (N.J. Super. Ct. App. Div. 1996). Finding no relevant state constitutional or statutory right to housing, see, for example, *Moore v. Ganim*, 660 A.2d 742 (Conn. 1995). More generally, see *Mitchell v. Steffen*, 504 N.W.2d 198, 203 (Minn. 1993) (no state constitutional right to welfare);

Our legal culture generally addresses such matters under the category of individual rights, or at best the rights of homeless families.[5] There may ultimately be little harm in thinking of homelessness in terms of recognizing or denying rights-claims. And in our legal culture, we may have little realistic choice but to focus on claims and denials of rights or entitlements. Still, perhaps something important is missed by our not thinking more explicitly in terms of whether we have a strong moral duty or obligation toward homeless persons, or in terms of the idea of fraternity.

The analysis below devotes attention to the legal status of the idea of fraternity, and to related ideas. We do not naturally think of fraternity entirely in terms of individual rights and entitlements. In contrast, we do think naturally enough of liberty rights, and of rights to be treated equally in various respects. Fraternity or solidarity, however, is not so centrally a matter of claimed individual rights. Perhaps, again, this ultimately makes little difference. But if homelessness is largely a matter of something like the absence of an inclusive

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Daugherty v. Wallace, 621 N.E.2d 1374, 1378 (Ohio Ct. App. 1993) (same); *Kratzer v. Commonwealth*, 481 A.2d 1380, 1382 (Pa. Commw. Ct. 1984) (same); *Allen v. Graham*, 446 P.2d 240, 243 (Ariz. Ct. App. 1968) ("[t]he State has no common law or constitutional duty to support its poor."); *Beck v. Buena Park Hotel Corp.*, 196 N.E.2d 686, 688 (Ill. 1964) (same); *Div. of Aid for the Aged v. Hogan*, 54 N.E.2d 781, 782 (Ohio 1944) (same).

[4] For some unavoidably imperfect and definition-sensitive national estimates, see National Alliance to End Homelessness, Homelessness Counts (January 10, 2007), http://www.endhomelessness.org/content/general/detail/1440.

[5] For a mere sampling of the literature, see, for example, Curtis J. Berger, *Beyond Homelessness: An Entitlement to Housing*, 45 U. MIAMI L. REV. 315, 324–25 (1991) (arguing for a fundamental such right, but not necessarily at the federal constitutional level); Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL'Y 17, 18–19 (1992) (responding to the affirmative arguments of others partly on grounds of the counter-productivity of comprehensive guaranteed rights packages); Florence Wagman Roisman, *Establishing a Right to Housing: An Advocate's Guide*, 428 PLI LITIG. HANDBOOK SERIES 9, 17 (1992) ("A right to housing is emerging in the United States. It is rooted not primarily in federal constitutional doctrine, but rather in state lawmaking and state court litigation involving state constitutions and state statutes."); Dennis D. Hirsch, Note, *Making Shelter Work: Placing Conditions on an Employable Person's Right to Shelter*, 100 YALE L.J. 491 (1990); Geoffrey Mort, Note, *Establishing a Right to Shelter for the Homeless*, 50 BROOK. L. REV. 939 (1984). At the level of human rights claims, see, for example, NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, HOMELESSNESS IN THE UNITED STATES AND THE HUMAN RIGHT TO HOUSING i (January 14, 2004), http://www.nlchp.org/content/pubs/homelessnessintheUSandrightstohousing.pdf (noting the reference to adequate housing rights in Article 25(1) of the 1948 Universal Declaration of Human Rights).

sense of fraternity, the homeless are at a cultural disadvantage in expressing their voice in a legal culture of rights.[6]

In fact, we shall argue below that fraternity and solidarity, or their absence, are central to understanding what is missing from our legal and specifically constitutional responses to homelessness.[7] In particular, we argue crucially that lack of various liberties[8] and equalities,[9] despite their importance in other contexts, are not as central to what is most deeply objectionable about homelessness as is the lack of fraternity.

In a phrase, involuntary homelessness is more deeply, more centrally, and more precisely about lack of fraternity or solidarity than it is about lack of liberty or equality, carefully understood. And this is in turn unfortunate for the homeless, because of the nature of our Constitution. Homelessness and the main themes of our Constitution are a mismatch. We can imagine a constitutional culture that gives weight not only to liberty and equality, but to fraternity as well.[10] But our own constitutional tradition has focused on liberty and equality, and has de-emphasized fraternity and its cognates. If, as we argue, it is lack of fraternity that is crucial to homelessness, and liberty or equality, carefully understood, only to a lesser degree, we have made substantial progress toward doctrinally understanding the marginal status of the homeless under our constitutional order.

II. WHAT'S WRONG WITH HOMELESSNESS?

Developing a satisfying theory of the basic moral wrongness of chronic, involuntary homelessness in an advanced post-industrial society is surprisingly troublesome. For this, there turn out to be a number of reasons.

One might imagine, first, that the sight of a particular homeless person would tend to evoke a more or less hard-wired sense of empathy.[11] But

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[6] For a controversial discussion of our collective focus on rights-claims, see MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

[7] *See infra* Part II.

[8] *See infra* notes 91–102 and accompanying text.

[9] *See infra* notes 103–17 and accompanying text.

[10] *See infra* notes 58–69 and accompanying text.

[11] For discussion of the scope and limitations thereof, see, for example, MARC D. HAUSER, MORAL MINDS: HOW NATURE DESIGNED OUR UNIVERSAL SENSE OF RIGHT AND WRONG (2006); RICHARD JOYCE, THE EVOLUTION OF MORALITY (2006); EVOLUTION AND ETHICS: HUMAN MORALITY IN BIOLOGICAL AND RELIGIOUS PERSPECTIVE (Philip Clayton & Jeffrey Schloss eds., 2004); PETER SINGER, A DARWINIAN LEFT: POLITICS, EVOLUTION AND COOPERATION (1999).

homelessness can evoke indifference, if not discomfort and hostility, as well. It has been observed that "homelessness is not just the condition of lacking a home in the sense of a 'roof over one's head.' It is the . . . condition of not being acknowledged as belonging to society . . . . [I]n practice we act as if they do not even exist."[12] Even our collective attempts to assist the homeless can bespeak a certain submerged contempt.[13]

Despite our ambivalence with regard to the homeless, there is also a sense that assisting the homeless is somehow beyond—perhaps above, or beneath—any articulated moral justification. The well-known philosopher Alasdair MacIntyre has thus concluded that "to ask for some deeper justification or sufficient reason for assisting one who is starving or . . . freezing to death is itself a sign of defective virtue."[14]

Perhaps one could say that for many of us, our certainty that it is right to rescue the homeless person from death by exposure is greater than our certainty of the correctness of any particular moral theory justifying such a rescue. Perhaps our conviction of the moral rightness of rescuing such a homeless person might be stronger even than our confidence in any combination of underlying moral theories.

Yet there is clearly important moral thinking to be done. And Professor MacIntyre himself enters into the realm of moral justification in saying that "[t]he stranger's urgent need provides a sufficient reason for going to her or his

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[12] Keith Burkum, *Homelessness, Virtue Theory, and the Creation of Community*, *in* THE ETHICS OF HOMELESSNESS: PHILOSOPHICAL PERSPECTIVES 79, 79 (G. John M. Abbrano ed., 1999). *See also id.* at 80 (what some persons perceive as uncomfortable or "aggressive" panhandling may in some instances reflect a need for social recognition or acknowledgment as opposed to a backgroundedness to the point of invisibility).

[13] One not entirely atypical account refers to a Washington, D.C. homeless shelter that "was full of vermin, had broken windows and large holes in the walls, and only one working shower for five hundred men." Anita Superson, *The Homeless and the Right to 'Public Dwelling,' in* THE ETHICS OF HOMELESSNESS: PHILOSOPHICAL PERSPECTIVES 141, 146 (G. John M. Abbrano ed., 1999). More subjectively, consider the report by a shelter resident:

> What you fear is that you will be here forever. . . . Sometimes I think: It's an experiment. They are watching you to find out how much you can take. Someone will come someday and say: 'Okay this guy has suffered long enough. Now we'll take him back into our world.' Then you wake up and get in line . . . .

JONATHAN KOZOL, RACHEL AND HER CHILDREN: HOMELESS FAMILIES IN AMERICA 217 (reprint ed. 2006).

[14] ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES 158 (1999).

aid."[15] The idea of a 'need' and even of meeting an urgent need, may be murky,[16] but with this concept of need we have clearly begun an attempt to provide a moral account for our rescuing the homeless person.

In fact, on some theories, establishing housing or shelter as a genuine need can be morally decisive. It has thus been argued that "[q]uestions about human needs are questions about human obligations. To ask what our needs are is to ask not just which of our desires are strongest and most urgent, but which of our desires give us an entitlement to the resources of others."[17]

This is not to suggest that 'needs,' even in the realm of housing, cannot be artificially stimulated, manipulated, contrived, or expanded in some arbitrary cultural process of dubious moral weight.[18] The 'need' for housing in a sense exists along a cultural continuum and is in that sense quite variable.[19]

There are some limits, however, to the deconstructability of the need for shelter. In a cold climate, for example, the risk of freezing to death as a result of inadequate insulation from the elements is not simply some conventional construct. There is thus an inescapable point to saying, with Professor David Braybrooke,[20] that "every human being needs . . . some clothing, some shelter, some heat."[21] Minimal human social functioning and basic social role fulfillment underwrite housing in this sense as a genuine need.[22]

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[15] *Id.*

[16] *See, e.g.*, LAWRENCE A. HAMILTON, THE POLITICAL PHILOSOPHY OF NEEDS 27–31 (2003) (discussing "vital" and "basic" needs, including shelter or protection from the elements, classically thought to be biological, acultural, and apolitical, and thus fixed and universal, but on Hamilton's approach historically, culturally, and politically conditioned and fulfillable in various ways and degrees, making a strict distinction between 'needs' and 'wants' unsustainable).

[17] MICHAEL IGNATIEFF, THE NEEDS OF STRANGERS 27 (1985).

[18] For a classical review, see, THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS (Houghton Mifflin ed. 1973) (1899); JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY (New American Library 2d rev. ed. 1969) (1958).

[19] *See, e.g.*, LAWRENCE A. HAMILTON, *supra* note 16, at 27–31.

[20] DAVID BRAYBROOKE, MEETING NEEDS (1987).

[21] *Id.* at 44. *Cf.* Martha C. Nussbaum, *Social Justice and Universalism: In Defense of an Aristotelian Account of Human Functioning*, 90 MODERN PHILOLOGY (Supp.) S46, S58 (1993) (discussing "adequate shelter" in terms of "basic human functional capabilities").

[22] *See* DAVID BRAYBROOKE, *supra* note 20, at 44, 47; Martha C. Nussbaum, *supra* note 21, at S58. For useful reviews of Braybrooke's theory of needs, see Gordon Graham, *David Braybrooke, The Meeting of Needs*, 38 PHIL. Q. 381 (1988) (book review); Alan Wertheimer, *Braybrooke, Meeting Needs*, 17 POL. THEORY 330 (1989) (book review). *See also* Marvin

A focus on the idea of need as a crucial moral category, at least near the margins of subsistence and survival, has a distinguished pedigree. Remarkably, Thomas Aquinas concluded that in the absence of any other remedy, relieving one's manifest and urgent need by taking from the surplus of another, whether openly or secretly, is lawful and does not amount to theft.[23] More pointedly, St. Bonaventure quotes St. Francis of Assisi to the following effect: "I believe the great Almsgiver will charge me with theft if I do not give what I have to one who needs it more."[24] Even the perceived champion of individual property rights, John Locke, emphasizes the public and private duty to sustain those with at best a tenuous hold on the bare necessities.[25]

Still, we cannot say that the idea of need by itself supplies a complete understanding of the moral landscape of involuntary homelessness. The idea of need plays a role in such an understanding, but only in conjunction with an overlapping, mutually supportive "cluster"[26] of related concepts. The idea of meeting a need by itself will not suffice.

If we are to understand the moral dimensions of homelessness and homelessness policy in an economically advanced society, we must, for example, think as well in terms of ideas such as community, community membership,

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Zetterbaum, *Equality and Human Need*, 71 AM. POL. SCI. REV. 983, 988–89 (1977) (discussing purportedly objective or empirically-grounded basic need typologies).

[23] THOMAS AQUINAS, SUMMA THEOLOGICA II—II, qu. 66, art. 7, *respondio* (Fathers of the English Dominican Province trans.) (2d rev. ed. 1920) *available at* http://www.newadvent.org/summa/3066.htm (online ed. Kevin Knight 2003). *Cf.* LORD JOHN ACTON, 3 SELECTED WRITINGS OF LORD ACTON: ESSAYS IN RELIGION, POLITICS, AND MORALITY 552 (J. Rufus Fears ed. 1988) (1881) ("[p]overty has its rights as well as property").

[24] BONAVENTURE, *The Life of St. Francis*, *in* THE SOUL'S JOURNEY INTO GOD, THE TREE OF LIFE, AND THE LIFE OF ST. FRANCIS 177, 254 (Ewert Cousins trans. 1978) (1263).

[25] For discussion of Locke's views in the context of homelessness, see Alexander Tsesis, *Eliminating the Destitution of America's Homeless: A Fair, Federal Approach*, 10 TEMP. POL. & CIV. RTS. L. REV. 103, 119–20 (2000).

[26] The relationships among this "cluster" of concepts thus differ somewhat from the typically looser, more independent relationships among the components of what are referred to as "cumulative case" arguments. For general discussion, see R. George Wright, *Cumulative Case Legal Arguments and the Justification of Academic Affirmative Action*, 23 PACE L. REV. 1, 4 (2002) (citing cumulative case arguments in a range of academic disciplines) ("[w]e may be able to establish a belief or value, to any degree of certainty, only through the somehow combined force of a number of different items of evidence, each of which, by itself, may lack real power to persuade"). *See also* James W. Nickel, *Poverty and Rights*, 55 PHIL. Q. 385, 391 (2005) ("If a right has multiple justifications, the failure of one will be less likely to call the right's justification into doubt."). *See generally id.* at 388 (referring to environmentally appropriate shelter).

and promoting the common good of the community.[27] In particular, we must notice that not all communities are mere separationist enclaves or literal gated communities, limited on the basis of economic class or wealth, as distinct from a more inclusive community pursuing the broader common good.[28]

The great social theorist Georg Simmel recognized that the poor are obviously in some minimal sense incorporated into the social totality.[29] But the poor may also crucially be outsiders, or nonmembers. Simmel writes that "[t]he poor are approximately in the situation of the stranger to the group who finds himself, so to speak, materially outside the group in which he resides.[30]

Developing this theme as morality and public policy, David Hollenbach has indicated specifically that "[p]oor people who are unemployed, inadequately housed, and undereducated in American inner cities are not part of a society that can be called a commonwealth."[31] Hollenbach's view is that "[n]o one who is a citizen of a functioning community should be relegated to the sidelines of social interaction . . . ."[32] Each citizen, as an appropriately acknowledged constituent member of the community, should seek to promote the community's

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[27] For general background, see, for example, THE CONCEPT OF COMMUNITY: READINGS WITH INTERPRETATIONS (David W. Minar & Scott Greer eds. 1969). *See also* WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1991) (discussing communitarian critiques of liberalism and liberalism's often-claimed official neutrality as among various conceptions of what constitutes a good life for persons); JEFFREY STOUT, DEMOCRACY AND TRADITION 301 (2004) ("Communitarians refer to communities as constituted by common ends . . . .") Of special interest are DOUGLAS STURM, SOLIDARITY AND SUFFERING: TOWARD A POLITICS OF RELATIONALITY 15 (1998) (distinguishing a robust, pluralistic, inclusive conception of community from a narrower sense of community); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 148–52 (1982) (discussing stronger and weaker conceptions of community in the context of John Rawls' Theory of Justice).

[28] *See, e.g.*, David Hollenbach, *The Common Good and Urban Poverty*, AMERICA, June 5–12, 1999, at 8, 10 (the bonds forged within such enclaves as more like social club relationships than bonds "among fellow citizens concerned for the good of the wider community"); Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 501–02 (1989) (discussing a sense of an inseparability of justice and the value of one's own life from justice for all of the members of the broader community).

[29] *See* GEORG SIMMEL, *The Poor, in* ON INDIVIDUALITY AND SOCIAL FORMS 150, 158 (Donald N. Levine ed., Univ. Chicago Press 1971) (1908).

[30] *Id. See also* Burkum, *supra* note 12, at 80.

[31] DAVID HOLLENBACH, THE COMMON GOOD AND CHRISTIAN ETHICS 202 (2002).

[32] *Id.* Somewhat less inclusively, the sociologist Robert Nisbet wrote that "the claims of freedom and cultural autonomy will never have recognition until *the great majority* of individuals in society have a sense of cultural membership in the significant and meaningful relationships of kinship, religion, occupation, profession, and locality." Robert A. Nisbet, The Quest for Community 283 (1953) (emphasis added).

common good, even as the well-being of all individual community members is an element precisely of the community's common good.[33]

This acknowledgment and inclusion of the marginal figure and his or her interests will in turn require further explanation. Sometimes, we can recur to the fulfillment of vital needs, as discussed above,[34] at least as one element of a normative approach to homelessness. But other, admittedly closely related, approaches will also be of assistance.

Some moral theorists, for example, are interested in one variety or another of what is called 'perfectionism,' including a distinctly egalitarian version of perfectionism, under which an aim of the society and the law is to promote the projects and distinctive excellences of each person.[35] We may assume that no such version of egalitarian perfectionism can be fulfilled if any number of persons must devote too much energy and attention to ensuring merely that they have arrangements for a roof over their heads, and other insulation against the elements.

Relatedly, though, some would also argue that involuntary, chronic homelessness in an economically advanced constitutional democracy disrespects the intrinsic worth or essential dignity of the person. There could be multiple grounds—subjective or objective—for finding indignity in such cases. Without relying on anything that is especially controversial in the work of the philosopher Immanuel Kant,[36] one could certainly object to homelessness on grounds

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[33] *See, e.g.*, MARK C. MURPHY, NATURAL LAW IN JURISPRUDENCE AND POLITICS 86 (2006) ("Each person in a political community is bound to act for the common good of that community."); ALASDAIR MACINTYRE, *supra* note 14, at 156 (in light especially of our acknowledged mostly mutual dependencies).

[34] *See supra* text accompanying notes 15–25.

[35] For modern discussion of perfectionist themes extending back at least to Aristotle, see, for example, VINIT HAKSAR, EQUALITY, LIBERTY AND PERFECTION (1979); PHILIPPA FOOT, NATURAL GOODNESS (2003); and most especially THOMAS HURKA, PERFECTIONISM (1993). For useful reviews of Hurka, see Michael Stocker, *Some Comments on Perfectionism*, 105 ETHICS 386 (1995) (book review); Tim Mulgan, *Review of Perfectionism*, 103 MIND 553 (1994) (book review). From the Enlightenment Era, see Antoine-Nicolas de Condorcet, Sketch for a Historical Picture of the Progress of the Human Mind, in Selected Writings 209, 279 (Keith Michael Baker ed. 1976) (1793) ("No one can doubt that, as . . . housing becomes healthier . . . better health will be ensured.").

[36] For Kant's own admittedly distinctive formulation, see IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor trans. & ed.) (Cambridge Univ. Press ed. 1998) (1785). For discussion, see THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY (1992); ALLEN W. WOOD, KANT'S ETHICAL THOUGHT 115 (1999). For a somewhat broader focus, see Izhak Englard, *Human Dignity: From Antiquity to Modern Israel's*

of the various sorts of indignities, personal and social, associated with homelessness.

Interestingly, the sense of the unforfeitability and inviolability of the dignity of the person can then be carried over into the related realm of love of neighbor, or agape. A leading scholar thus writes that "[a]gape is a regard for the neighbor which in crucial respects is independent and unalterable"[37] and on that basis links to the idea of a universal "irreducible worth and dignity."[38]

We need take no position on the legitimate role, if any, for love of neighbor in accounting for any moral or legal obligations we may hold with respect to homelessness. Certainly, any such argument may seem distasteful or legally inappropriate on a number of grounds. The Victorian political theorist Sir James Fitzjames Stephen doubtless spoke for many in arguing that "it is not love that one wants from the great mass of mankind, but respect and justice."[39] Suffice it to say, though, that some accounts of agape or neighbor love actually emphasize not any sort of passion, but instead a sense of universal equality,[40] and an unwillingness to prefer or to discriminate on unjustified grounds.[41] Justice and agape, on some accounts, can thus be closely related.[42]

Specifically, it has been argued that agape establishes the possibilities, favorable and unfavorable, for community life.[43] In any event, something like the agapic commitment to equal dignity, to radical equality, or to self-gift has been thought to imply a basic right to housing in particular.[44] But even where

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Constitutional Framework, 21 CARDOZO L. REV. 1903 (2000); Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36 (1977) (distinguishing 'recognition respect' from 'appraisal respect'). *See also* RICHARD SENNETT, RESPECT IN A WORLD OF INEQUALITY (2004).

[37] GENE OUTKA, AGAPE: AN ETHICAL ANALYSIS 9 (1972).

[38] *Id.* at 13. Outka also closely links agape with the relief of needs, and relief of suffering, largely independent of merit or desert. *See id.* at 91.

[39] JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 164 (Stuart D. Warner ed. 1993) (1874).

[40] *See* SOREN KIERKEGAARD, WORKS OF LOVE 67, 72 (Howard Hong & Edna Hong trans.) (Harper ed. 1962) (1847).

[41] *See id.* Kierkegaard carefully distinguishes condescending to one's assumed social or economic inferiors. *See id.* at 72. For a contemporary approach, see TIMOTHY P. JACKSON, THE PRIORITY OF LOVE 10 (2003) ("[A]gape involves . . . unconditional willing of the good for the other . . . equal regard for the well-being of the other, and . . . passionate service open to self-sacrifice for the sake of the other.").

[42] *See* Walter Harrison, *The Idea of Agape in the New Testament*, 31 J. RELIGION 169, 178 (1951).

[43] *See id.*

[44] See, for example, the discussion of the conclusions reached in David Hollenbach, *Human Rights in Catholic Thought*, AMERICA, Oct. 31, 2005,

agape underlies a specific concern for sheltering the homeless, some emphasis on other elements noted above of the same familiar "cluster" of related arguments is also helpful and likely. One official church document[45] on homelessness, for example, refers not only to love of neighbor,[46] but variously as well to fulfillment[47] or perfectionism, to dignity,[48] to basic needs,[49] and to the desire of homeless persons "to integrate themselves normally into society."[50]

The same document also refers crucially to the value of solidarity[51] with homeless persons and with the poor in general. The value of social solidarity is not merely another of the closely related "cluster values" commonly associated with a critique of homelessness policy. Solidarity, along with its close cognates,[52] crucially fraternity, actually offers the clearest path to understanding the constitutional status, or lack thereof, of involuntary homelessness.

The idea of solidarity can be thought of in an unduly narrow sense, as in the cases of mere kinship solidarity, team or class solidarity, or solidarity with one's fellow trade union members, all thought of in an exclusionary way.[53] But the idea of solidarity is open to more encompassing and inclusive uses as well, in ways that illustrate its affinities with the "cluster" concepts referred to above.

Thus Professor Michael Ignatieff holds that the initial idea of 'needs' implies "that human beings actually feel a common and shared identity in the basic fraternity of hunger, thirst, cold, exhaustion, loneliness or sexual passion. The possibility of human solidarity rests on this idea of natural human

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http://www.bc.edu/bc_org/rvp/pubaf/05/Hollenbach_America.html. ("[T]he Compendium strongly affirms that all have the right to basic necessities, such as food, housing, just wages and adequate social security.").

[45] *See* Pontifical Council for Justice and Peace, On the International Year of Shelter for the Homeless (1991), http://www.catholicculture.org (search "On the International Year of Shelter for the Homeless"; then follow "On the International Year of Shelter for the Homeless" hyperlink).

[46] *See id.* at § 2, Conclusion.

[47] *See id.* at § 2.

[48] *See id.*

[49] *See id.*

[50] *Id.* at Conclusion.

[51] *See id.*

[52] For an attempt to distinguish solidarity from several admittedly similar concepts, see Christian Arnsperger & Yanis Varoufakis, *Toward a Theory of Solidarity*, 59 ERKENNTNIS 157 (2003), *available at* http://www.springerlink.com/content/r15gl47p22107p21/fulltext.pdf.

[53] Neutral as among narrow and broadly encompassing notions would be solidarity as a set of dispositions associated with "strong feelings of cooperation, mutual identification, and similarity of status and position." Lawrence Crocker, *Equality, Solidarity, and Rawls' Maximin*, 6 PHIL. & PUB. AFF. 262, 263 (1977).

identity."[54] Similarly, it has been argued that "[f]rom a common good perspective . . . justice calls for the minimal level of solidarity required to enable all of society's members to live with basic dignity."[55] At its most expansive, the idea of solidarity is said to have "dimensions of compassion, reconciliation, generosity, forgiveness, fidelity, love, justice, and collaboration. . . ."[56]

This is not to suggest that the idea of inclusive solidarity is always thought to carry deep metaphysical commitments. Solidarity without much metaphysics, or even a deep anthropology, has been a central theme in the political writings of the pragmatist philosopher Richard Rorty. Rorty thus writes that

> solidarity is not thought of as recognition of a core self, the human essence, in all human beings. Rather, it is thought of as the ability to see more and more traditional differences (of tribe, religion, race, customs, and the like) as unimportant when compared with similarities with respect to pain and humiliation—the ability to think of people wildly different from us ourselves as included in the range of "us."[57]

The idea of solidarity has understandably been closely linked, conceptually and historically, with the idea of fraternity. And it is the historical path of the idea of fraternity that sheds the greatest light on the marginal constitutional status of the homeless today.

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[54] IGNATIEFF, *supra* note 17, at 28.

[55] DAVID HOLLENBACH, THE COMMON GOOD AND CHRISTIAN ETHICS 192 (2002).

[56] MARIE VIANNEY BILGREN, SOLIDARITY: A PRINCIPLE, AN ATTITUDE, A DUTY? OR THE VIRTUE FOR AN INTERDEPENDENT WORLD? 1 (1999). Bilgren also sees "community, unity, hope, mutual good, [and] responsibility for and trust in one another" as "basic components of solidarity." *Id.* at 3. Almost as multi-facetedly, solidarity has been defined in terms of "shared membership characterized by mutual care and mutual respect, that is, a sense of belonging enriched by a commitment to human dignity—to love one's neighbor as oneself." Francis J. Schweigert, *Solidarity and Subsidiarity: Complementary Principles of Community Development*, 33 J. SOC. PHIL. 33, 33 (2002).

[57] RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 192 (1988). *See also* H.O. MOUNCE, THE TWO PRAGMATISMS: FROM PIERCE TO RORTY 201 (1997) (according to Rorty, "there is no tendency to solidarity in human nature; indeed Rorty denies that human beings have a common nature. Nevertheless, he exhorts us to create that solidarity."). *See also* John McDowell, *Toward Rehabilitating Objectivity*, *in* RORTY AND HIS CRITICS 109, 110 (Robert B. Brandom ed., 2000) ("Rorty's call is to abandon the discourse, the vocabulary, of objectivity, and work instead towards expanding human solidarity."); Charles Guignon & David R. Hiley, *Introduction: Richard Rorty and Contemporary Philosophy*, *in* RICHARD RORTY 1, 24 (Charles Guignon & David R. Hiley eds., 2003).

III. LIBERTY, EQUALITY, AND FRATERNITY

When we think of the historical rise of the Western liberal political state, we think of the French Revolutionary Republic and of the triadic values of liberty, equality, and fraternity. It has even been suggested that "modernity might be characterized by the three words of the motto of the French Republic: Liberty, Equality, Fraternity."[58]

Despite the associations between fraternity and certain understandings of liberty and equality, the three values have not been historically inseparable. The 1789 French Declaration of the Rights of Man and Citizen, for example, clearly and explicitly emphasizes liberty and equality, but not the value of fraternity.[59] The value of fraternity in fact got off to a bit of a late start, and in substantive terms, to something of an early downplaying, if not an early exit.

Thus the historian William Doyle writes that

> [i]f we know nothing else about the French Revolution, we know that it spawned the famous motto adopted for the state by the Third Republic and never abandoned since, except by the Vichy regime: Liberty, Equality, Fraternity. In historical fact, fraternity came late, appearing only in 1793, and went soon, being largely abandoned by the end of 1794 as a now-redundant sop to the sanscoulottes.[60]

Rather quickly, the idea of fraternity was thus widely seen as an unnecessary concession to the poor,[61] if not as an unrealistic[62] or utopian[63] notion.[64]

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[58] Jean-Marie Cardinal Lustiger, *Liberty, Equality, Fraternity*, 76 FIRST THINGS 38 (1997), *available at* http://www.firstthings.com/article.php3?id_article=3745.

[59] *See, e.g.*, DECLARATION OF THE RIGHTS OF MAN AND CITIZEN (France 1789) *available at* http://www.columbia.edu/~iw6/docs/decright.html.

[60] WILLIAM DOYLE, THE OXFORD HISTORY OF THE FRENCH REVOLUTION 419 (2d ed. 2002).

[61] *See id.*

[62] Consider Thomas Carlyle's rather critical assessment of the idea of fraternity in the context of the Reign of Terror, in which "[f]raternity, out of old Catholicism, does, it is true, very strangely in the vehicle of a Jean-Jacques [Rousseau] Evangel, suddenly plump down out of its cloud-firmament; and from a theorem determine to make itself a practice." THOMAS CARLYLE, THE FRENCH REVOLUTION: A HISTORY 635 (Modern Library ed. 1934) (1837).

[63] *See id.*; SIMON SCHAMA, CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION 474 (1989) ("For the majority of deputies . . . Fauchet's millennial realm of love and brotherhood was just a utopian balloon, moved by its rhetorical hot air to drift over the revolutionary landscape.").

Crucially, the eclipse of fraternity, if not also of solidarity,[65] did not undermine the continuing dynamism of the other French revolutionary values of liberty and equality.[66] Fraternity, and to a degree its close cognates such as solidarity and community, seem to have thus slid into something of a generally subordinate status. Focusing directly on the idea of community, the philosopher John Ladd, for example, has concluded that "the concept itself has been regarded with suspicion."[67]

Professor Ladd then goes on to argue that the idea of community—or on our view, certainly, fraternity—occupies an awkward position. Ladd writes that "the idea of community does not, at least nowadays, readily fit into the established categories of ethical analysis, which . . . are generally framed in quasi-utilitarian terms of individual interests, rational choice, individual rights and the ideals of political liberalism."[68]

To the extent that homelessness is a problem of community, or the lack thereof, we may find that homelessness inherits the awkward fit of the value of community, solidarity and fraternity in a constitutional culture of individualism, individual rational choice, and of individual rights. We may think of this as the problem of fraternity's poor fit with, if not its near absence from, the United States' constitutional framework. We pursue this constitutional marginalization of fraternity below.[69]

We should be under no illusions as to the scope of the problem. The problem of the constitutional status of homelessness does not become easily resolvable merely by redirecting our attention to other grounds for objecting to the failure to adequately address homelessness. Recall that we have referred to the problem of homelessness in terms of a failure of empathy,[70] lack of social

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[64] One scholar marks the European revolutionary movements of 1848 as superseding the idea of broad fraternity with that of group solidarity. *See* HAUKE BRUNKHORST, SOLIDARITY: FROM CIVIC FRIENDSHIP TO A GLOBAL LEGAL COMMUNITY 1 (Jeffrey Flynn trans. 2005) (2002).

[65] *See id.*

[66] *See* SCHAMA, *supra* note 63, at 474–75 (eclipse of French revolutionary value of fraternity did not impeach the value of equality). For a survey of the career of the idea of liberty, see ISAIAH BERLIN, *Two Concepts of Liberty*, *in* LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY 166, 166–217 (Henry Hardy ed. 2002). For an argument that accepting the value of equality need not be tied to accepting the related idea of solidarity, see Albert Weale, *Equality, Social Solidarity, and the Welfare State*, 100 ETHICS 473, 477 (1990).

[67] John Ladd, *The Idea of Community, an Ethical Exploration, Part I: The Search for an Elusive Concept*, 32 J. VALUE INQUIRY 5, 5 (1998).

[68] *Id.*

[69] *See infra* note 117 and accompanying text.

[70] *See supra* note 11 and accompanying text.

acknowledgment,[71] contempt,[72] self-evident moral obligation,[73] urgent need,[74] community[75] and the common good,[76] social exclusion,[77] flourishing and perfectionism,[78] indignity and inviolable dignity,[79] love of neighbor,[80] and solidarity[81] as well as fraternity.[82] It is fair to say that none of these themes and values even minimally approaches centrality to the American constitutional experience.

It is, however, the near absence of the value of fraternity from the American constitutional scheme that is of special note. The value of fraternity seems clearly inconsistent with a perennial social condition of chronic involuntary homelessness on any substantial scale. And crucially, at least the abstract possibility of constitutionally valuing fraternity, along with liberty and equality, is suggested by the historic French example.[83]

But does the nearly complete absence of fraternity from the American Constitution, originally or as amended, make any difference for homelessness as a social and legal problem? Particular conceptions of both liberty and equality, the first two elements of the French revolutionary triad, clearly pervade the American Constitution. Our Constitution does not feature fraternity, but the Constitution does emphasize least certain forms of liberty and equality. In the context of homelessness, might not some politically palatable conceptions of liberty and equality suffice in fraternity's stead?

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[71] *See supra* note 12 and accompanying text.
[72] *See supra* note 13 and accompanying text.
[73] *See supra* note 14 and accompanying text.
[74] *See supra* notes 15–26 and accompanying text.
[75] *See supra* notes 27–33 and accompanying text.
[76] *See id.*
[77] *See supra* notes 29–32 and accompanying text.
[78] *See supra* notes 33–35 and accompanying text.
[79] *See supra* note 36 and accompanying text.
[80] *See supra* notes 38–45 and accompanying text.
[81] *See supra* notes 51–57 and accompanying text.
[82] *See supra* notes 58–64 and accompanying text.
[83] *See supra* notes 58–66 and accompanying text. For a rather more recent French initiative on the problem of homelessness, see Kerstin Gehmlich, *France Endorses Housing as a Legal Right*, BOSTON GLOBE, Jan. 4, 2007, http://www.boston.com/news/world/articles/2007/01/04/france_endorses_housing_as_a_legal_right/. The article in question reports then presidential candidate Nicolas Sarkozy as vowing "that no homeless person would have to sleep outside within two years of his taking office." *Id.* Official figures put the number of French homeless as of 2001 at 86,500. *Id.*

In a word, no. In the legal cases addressing the rights of the homeless, themes of liberty[84] and equality[85] recur, as we shall see,[86] frequently. But the various commonly asserted liberty and equality rights of the homeless, even if legally recognized, would in most instances fall far short of any genuine resolution of homelessness as a fundamental social and legal problem.[87] Liberty and equality do not make up for the absence of fraternity in the context of homelessness.

Now, we can certainly think of liberty and equality in ways not confined to the typical run of American homeless litigation issues and theories. We could in theory adopt particular understandings of both liberty[88] and equality[89] that would imply an enforceable right to housing, and an end to involuntary homelessness.

But even so, the ideas of liberty and of equality, in our constitutional tradition, are not well-suited to capturing and embodying any of the most central rationales[90] comprising the basic moral critique of homelessness. Our most familiar understandings of liberty and equality simply do not fit well with the underlying concerns at stake in homelessness as a social and legal problem.

Let us briefly consider first the relation between liberty, or freedom, and homelessness. Here, we have a powerful, acutely argued treatment by Professor Jeremy Waldron.[91] With the substance of Professor Waldron's argument we need take no issue. Our argument is merely that liberty, as typically understood in our constitutional system, is less central to the problem of

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[84] *See infra* Part IV.

[85] *See id.*

[86] *See id.*

[87] *See id.*

[88] Any enforceable legal rule guaranteeing a genuinely free choice between housing and no housing would suffice.

[89] An enforceable rule guaranteeing equally to all persons housing of at least some baseline quality could count as an interpretation of the equality or equal dignity of persons.

[90] *See supra* Part II.

[91] Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991). For brief discussion of Professor Waldron on homelessness, see, for example, CHARLES FRIED, MODERN LIBERTY AND THE LIMITS OF GOVERNMENT 80–81 (2007). Pursuing some of Waldron's themes is Jane B. Baron, *Homelessness as a Property Problem*, 36 URB. L. 273, 284 (2004) (or realistically, a problem of "no property").

homelessness than are the concepts we introduced above,[92] some of which, including the idea of dignity, Waldron himself emphasizes.[93]

Professor Waldron's crucial argument in this respect, dramatically condensed, is that our regime of property rights is contributing to "a state of affairs in which a million or more citizens have no place to perform elementary human activities like urinating, washing, sleeping, cooking, eating, and standing around."[94] According to Professor Waldron's understanding, this state of affairs amounts to a significant lack of freedom for those affected, in a traditional "negative" sense of the term.[95] As Waldron explains the usage, "a person is free to be someplace just in case he is not legally liable to be physically removed from the place or penalized for being there. At the very least, negative freedom is freedom from obstructions such as someone else's forceful effort to prevent one from doing something."[96] In this sense, then, the homeless lack basic liberty.[97]

Still, lack of liberty itself is not central to what is most deeply objectionable about homelessness, in contrast to some or all of the moral approaches to homelessness referred to above. Liberty, or its absence, may be crucial to understanding why there has arisen and remains a legal and social problem of homelessness. But lack of liberty, precisely understood, is not central to the basic moral objectionability of involuntary homelessness.

Professor Waldron rightly characterizes homelessness as involving what amounts to a legally imposed prohibition on one's exercise of the most inescapable, elemental functions.[98] At an only slightly greater extreme, we might imagine someone being denied oxygen to breathe based on their inability to pay. The problem with a focus on liberty, however, is that liberty as a concept is most at home in circumstances in which we can imagine more than one at least minimally valued, or more than just one objectively valuable, choice. Liberty thus comes into its own when we have realistically eligible alternatives. Most of us, however, care little about having a choice between

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[92] *See supra* Part II.

[93] *See, e.g.*, Waldron's discussion of dignity, privacy, and degradation in Waldron, *supra* note 91, at 320–24.

[94] *Id.* at 301.

[95] The classic distinction between 'negative' and 'positive' or developmental, self-realizational liberty would be BERLIN, *supra* note 66, at 169–181.

[96] Waldron, *supra* note 91, at 304.

[97] *See id.* at 304–05.

[98] *See supra* text accompanying note 94.

being homeless and not being homeless. Just not being homeless, or just having a home in this sense, is paramount.

Technically, we may be free to choose between starvation and sustenance; suffocation and breathing; freezing to death and surviving; or slightly less starkly, no shelter and shelter against the adverse elements. And we do not deny that a reasonable person could find horrific shelter conditions to be even less eligible than sleeping in a park. But in many instances, a choice between homelessness and a home is, in the vernacular if not literally, said to be no real choice at all. We care far less about the unconstrained freedom in choosing than we do about not being homeless, even if having a home were legally required. In contrast, when liberty is central, we are left socially unrestrained as between at least two alternatives of at least some minimal choice-worthiness.[99]

For most persons under most circumstances, freezing to death or suffocating are not minimally valuable options; they are simply states of affairs to be avoided. Abject homelessness, for most, is not an eligible lifestyle, as might be something like working at home, traveling more, retiring, or starting a business. Abject homelessness is not like the opportunity to vote for any of a range of more and less appealing political candidates. For most, homelessness is to be avoided, whether we are free to choose homelessness or not.

The massive difference in value, or between value and enormous dis-value, that separates having a home from abject homelessness thus makes homelessness less a matter of not having a genuine choice, and more a matter of winding up with an intensely undesired outcome. The most direct and substantive problem for such homeless persons is not their having no choice. The choice, if given, would not be an interesting one. The basic moral problem is not lack of liberty, but the commonly horrific character of homelessness as a

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[99] For discussion, see CHRISTINE SWANTON, FREEDOM: A COHERENCE THEORY 80, 162 (1992) (linking one's degree of freedom, all else equal, with the significance of one's available options, with 'significance' understood in terms of the chooser's interests); MATTHEW H. KRAMER, THE QUALITY OF FREEDOM 241–42 (2003) (distinguishing among the content-independent value of one's freedom to do or not do some action X; the content-dependent value of that freedom, and the sheer value of doing X). Kramer rightly recognizes that we sometimes value our freedom to do something we would have no inclination to do, especially if our freedom in that respect is a mark of public respect for our rationality and dignity as competent persons. *Id.* at 241. *See also* IAN CARTER, A MEASURE OF FREEDOM 54 (1999) (recognizing that what we see as valueless, undesirable, or otherwise ineligible alternatives may change, and may itself reflect our freedoms or lack of freedoms in other respects); STANLEY I. BENN, A THEORY OF FREEDOM 128 (1988) ("[I]t is incongruous to talk of unfreedom to do things that there could be no point in doing.").

way of living. Nor is our commonly strong preference for a home itself typically unfreely arrived at, or a product of subtle coercion.

This is not to suggest that ordinarily, homelessness is freely chosen.[100] We suggest merely that the generally overwhelming preferability of civilized housing to homelessness should draw much of our attention away from homelessness as a matter of an unfree choice, and toward the reasons why homelessness would not ordinarily be considered as an eligible option among others. Homelessness is, for various obvious reasons, typically a moral and practical disaster. That homeless persons are also typically not free to choose with respect to, say, eating or sleeping is normally secondary to the obvious, freely recognized harms of simply being unable to eat or sleep.

It might be thought that this argument could imply that even chattel slavery, because of its horrific quality and its unique undesirability, is only secondarily about freedom. This analogy is instructive, but imperfect. Being enslaved itself is horrific. A slave presumably wants, overwhelmingly, to just not be a slave. But having a free choice between remaining a slave and no longer being a slave probably is in itself often of greater dignitary value than being able to freely choose between homelessness and having a home. Slavery as a formal system typically tries to explicitly impeach the overall judgment, rationality, maturity and the value of independent living to the slave. Exercising precisely the choice to no longer be a slave may therefore be in itself of special dignitary value.

By contrast, we assume that most involuntarily homeless persons wish not liberty in the sense of a free choice between homelessness and a genuine home, but primarily just having a home. Being homeless is often officially unnoticed, and does not, in some sense, involve an explicit and invidious official assessment. Being homeless is usually not so stark of an official, formal impeachment of one's ability to value and utilize freedom as would be chattel slavery. Options, choices, or alternatives, one of which involves a home, are thus not of central concern for the homeless. Gaining a home is. Liberty or freedom in the standard constitutional sense is thus not central to homelessness in this regard. Freedom for the slave, and choosing to not be a slave, are thus typically of some value as a rebuttal to an official formal assessment.

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[100] See the language in *Franklin v. New Jersey Department of Human Services*, 543 A.2d 1, 3 (N.J. 1988) (per curiam) ("Homelessness functions not as a freely chosen option but as a tragic, inexorable destiny.") (citation omitted).

As a partial test of this claim that standard conceptions of liberty tend not to be central to the circumstances of the homeless, we can think of the actual case law involving various asserted liberty rights of homeless persons.[101] At the risk of oversimplifying, the liberty rights claims typically brought on behalf of the homeless seem, however well intended, to be less than dramatically transformative.[102] Typically, even a clear legal victory for homeless persons on matters of individual liberty and choice, however welcome, would leave the basic social experience of involuntary homelessness recognizably in place. One explanation for this would be that neither liberty nor, as we shall now see, equality, is as directly and as precisely central to the crucial moral harms of homelessness as would be our largely missing third constitutional element, the obligations of fraternity.

A parallel argument thus may be made that familiar conceptions of equality and inequality are also typically not central to what is most deeply objectionable about homelessness. Again, there is much to be said about, say, the obviously important inequalities between abjectly homeless and comfortably housed persons. Our point again is that what is most crucial, and most morally disturbing, about homelessness is not precisely a matter of inequalities among persons or circumstances.

Of course, the idea of inequalities inescapably attend our thinking about homelessness. Classically, for example, the French writer Anatole France observed ironically that the homeless "must labour in the face of the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread."[103] And our thinking about certain basic inequalities may well lead us to think about the problem of homelessness.

As a prominent example of the latter, consider the constitutional history and theory presented by Akhil Amar.[104] According to Professor Amar's view, the Thirteenth Amendment's abolition of slavery and involuntary servitude,[105]

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[101] *See infra* Part IV. The case of a freedom to beg or not beg for one's bare survival or sustenance may be a closer case. But even with regard to such begging, we can imagine that what typically matters most to a desperate beggar is the actual (successful) begging, or the exercised right or opportunity to beg, and not the freedom to beg or not for one's survival. For some relevant discussion, see Stephen R. Munzer, *Ellickson on* "Chronic Misconduct" *in Urban Spaces*, 32 HARV. C.R.-C .L. L. REV. 1, 7–8 (1997).

[102] *See infra* Part IV.

[103] ANATOLE FRANCE, THE RED LILY 91 (Winifred Stephens trans. 1923) (1894).

[104] For our purposes, see Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37 (1990).

[105] U.S. CONST. amend. XIII, § 1.

as enforceable by Congress,[106] has broad implications, and involves a broad public commitment. In particular, the Thirteenth Amendment is thought not to tolerate the perpetuation of "a degraded caste of people."[107] Affirmatively, there is said to arise "a right to sustenance and shelter: minimum sustenance, minimum shelter."[108]

Professor Amar explicitly emphasizes, however, that a right to a minimum floor level of some entitlement generally does not require equality in the distribution of that entitlement.[109] With respect to homelessness, we should similarly appreciate the difference between something like adequate or minimally decent housing on the one hand, and housing that is substantively equal among persons on the other.

Whatever its various complications,[110] equality and inequality is essentially a matter of comparisons, or of relative shares or distributions.[111] A homeless person who gains access to adequate housing may or may not thereby acquire housing that is equal in quality or quantity to anyone else's. Solving the problem of homelessness through universal access to adequate housing would imply little beyond that about substantive equality or inequality in housing.[112]

Of course, the idea of equality in one form or another would attend any real solution to the problem of homelessness. After all, any one adequate home is equally within the category of adequate homes as any other adequate home. Persons with homes equally have homes. More deeply, we might want to provide an adequate home to a homeless person because he or she is equal to the rest of us in some quality like dignity, humanity, vulnerability, or need.[113]

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[106] *Id.* § 2.

[107] Amar, *supra* note 104, at 39.

[108] *Id.*

[109] *Id.* at 41.

[110] For a number of such complications, see DOUGLAS RAE ET AL., EQUALITIES (1983); AMARTYA SEN, INEQUALITY REEXAMINED (1992); LARRY S. TEMKIN, INEQUALITY (1993).

[111] *See, e.g.*, TEMKIN, *supra* note 110, at 8, 246. Arguably, the Supreme Court has misunderstood the comparative essence of equality in holding that some minimally sufficient education qualifies as equal protection in education. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36–37 (1973) (citing Lindsey v. Normet, 405 U.S. 56 (1972)) (a case concerning housing).

[112] More broadly, consider the distinctions drawn more generally between, say, the sufficiency of one's resources and the equality of one's resources, in the collection, *Should Differences in Income and Wealth Matter?*, 19 SOCIAL PHIL. & POL'Y 1 (2002) or in book form as SHOULD DIFFERENCES IN INCOME AND WEALTH MATTER? (Ellen Frankel Paul, Fred D. Miller & Jeffrey Paul eds. Cambridge Univ. Press 2002).

[113] See the more basic and direct rationales discussed *supra* Part II.

One limitation of the value of this focus on equality in this sense, however, is that equality then becomes trivially the justification of every sound public policy in every area. We should not, for example, punish a given individual cruelly and unusually because of that individual's equal dignity or equal capacity for suffering along with all those of us who do not deserve such treatment. In such a case, and in that of homelessness, it is not equality that is doing the crucial work, but one or more of the deeper and more direct moral concerns referred to above.[114]

In general, then, the broad constitutional ideas of liberty and equality are certainly associated with the problem of homelessness, but are not of the moral essence of the problem in the way that fraternity, the third element of the French revolutionary triad, more directly is. The fact that our Constitution recognizes explicitly some forms of liberty[115] and equality,[116] but not fraternity or solidarity,[117] thus contributes to a deep explanation of the long-term fate of the homeless under the Constitution.

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[114] *See id.* This is not to deny that there are some contexts in which treating someone adequately requires treating the person equally, as in various sorts of purely competitive contexts, including contests, academic tests, or sports events. On the other hand, we can imagine, however unrealistically, a housing subsidy solution to the problem of homelessness that increased the value of the average home by an amount greater than the subsidy given to homeless persons, in this sense increasing inequality.

[115] We may tend to think first of the provisions of the First Amendment when we think of constitutional liberty, but a number of provisions not only of the Bill of Rights more broadly, but of even the unamended text of the Constitution promote liberty of persons and groups in various respects. For broad discussion, see, respectively, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005).

[116] Here, the Reconstruction Amendments, and the Fourteenth Amendment in particular would occur to us first, but again, as with liberty, the idea of equality in one respect or another recurs throughout the amended and unamended Constitution.

[117] One could argue for fraternalist or solidaristic elements of several constitutional provisions, but only in some secondary, attenuated sense. Under the Commerce Clause, for example, there is a sense of a barrier-free, unified national market that should resist discrimination against out of staters and certain disfavored classes. *See, e.g.*, Saenz v. Roe, 526 U.S. 489 (1999) (privileges and immunities non-discrimination in welfare benefits); Shapiro v. Thompson, 394 U.S. 618 (1969); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (regarding importation of out-of-state waste for disposal); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964) (non-discrimination on racial grounds under 1964 Civil Rights Act Public Accommodations Title II). There is in all this no rich, classic, deep sense of fraternity or solidarity, certainly to the degree that liberty and equality arise in these and similar contexts.

It might well be argued that constitutional indifference to the problem of homelessness is a function not of the missing, third, fraternal element of the Constitution, but instead of the fact that our Constitution has been held to be a bulwark, primarily, of "negative" as distinct from "positive" rights.[118] Homelessness would on this view be a problem of an unsurprisingly unfulfilled "positive" constitutional right claim.

We need not deny that generally, though not entirely,[119] the Constitution has been interpreted to accord "negative" rights against governmental interfereence, rather than "positive" rights to affirmative, costly government provision of valuable resources.[120] And if so, this doctrinal fact would certainly bear upon our constitutional treatment of homelessness.

But one might then still ask why our Constitution, including its potentially rich and adaptable notions of liberty and equality, has been consistently interpreted to accord negative rather than positive rights, including any possible positive right to any minimal sort of physical shelter.[121] And this question doubtless has a complex answer. But one important element of such an answer would draw upon precisely our historical lack of any substantial constitutionalist sense of fraternity, solidarity, or of a universal and binding commitment to each of our fellows against basic adversities.

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[118] *See* DeShaney v. Winnebago County Dep't Soc. Servs., 489 U.S. 189, 195–96 (1989) (no constitutional right to positive, expensive, affirmative provision of governmental assistance even in practically vital circumstances of threat by private actors not implicating state responsibility); Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005). For discussion, see David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

[119] Probably the best-recognized federal constitutional right of a materially redistributive or costly nature is the right to free criminal counsel in serious cases for indigent defendants. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

[120] We assume this strict dichotomy between negative and positive rights only for the sake of the discussion. There may well be a continuum involved, borderline cases, or even mutual reclassifiability as between negative and positive rights. For brief discussion, see *Archie v. City of Racine*, 847 F.2d 1211, 1221–22 (7th Cir. 1988).

[121] In *Lindsey v. Normet*, the Court, arguably in dicta, referred not to minimal or adequate shelter, but to shelter of an unspecified particular quality, and denied the existence of any such constitutional right. *See* Lindsey v. Normet, 405 U.S. 56, 73–74 (1972) ("We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . ."). For a responsive strategy emphasizing the role of economic and social human rights advocacy, see Maria Foscarinas, *Advocating for the Human Right to Housing: Notes from the United States*, 30 N.Y.U. REV. L. & SOC. CHANGE 447, 447–48 (2006); Roisman, *supra* note 5.

On this approach, the general absence of positive constitutional rights would be partly explained by our missing constitutional triadic element, that of fraternity or solidarity. Of course, historically, the United States has hardly been without important institutions and movements rich in one sense or another of fraternity, group solidarity, charity, community, and even the pursuit of the common good.[122] But these cultural elements have rarely percolated into positive basic federal constitutional law.

It is worth mentioning that the single most prominent example of a recognizably positive constitutional right, the right to free criminal defense counsel in serious cases,[123] is mainly a matter of minimum adversarial fairness, as opposed to any explicit recognition of an underlying value of fraternity, or of our underlying bondedness with indigent defendants. This leaves open, then, the possibility that the general absence of positive constitutional rights, especially with regard to housing, reflects the general absence of the idea of fraternity at the federal constitutional level.[124]

IV. CONSTITUTIONAL HOMELESSNESS LITIGATION IN THE ABSENCE OF FRATERNITY

In the general absence of anything like fraternity or solidarity at the constitutional level, constitutional litigation on behalf of the homeless must take other tacks. Pursuing a theme introduced above,[125] we could say that in the absence of constitutional fraternity, rights-claims under the rubrics of liberty and equality remain. We have already seen, however, that carefully understood, neither liberty nor equality is central to the essence of homelessness.[126]

The constitutional absence of fraternity and the mismatch of liberty and equality with the problem of homelessness jointly contribute to a common reaction of disappointment in the constitutional homelessness cases. Disappointment here is not primarily a matter of preferring that the homeless

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[122] *See, e.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Gerald Bevan trans. Penguin Books 2003) (1835 & 1840); ROBERT D. PUTNAM, BOWLING ALONE 93–133 (2000); AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: THE REINVENTION OF AMERICAN SOCIETY 116–34 (1993); ARTHUR C. BROOKS, WHO REALLY CARES: THE SURPRISING TRUTH ABOUT COMPASSIONATE CONSERVATISM (2006).

[123] *See supra* note 119.

[124] *See supra* note 117 and accompanying text. Whether a deep explanation of our constitutional commitment to minimum adversarial fairness must at some point eventually draw upon the idea of fraternity, apart from equality, is a question we need not herein explore.

[125] *See supra* notes 115–16 and accompanying text.

[126] *See supra* notes 91–114 and accompanying text.

party had prevailed where they did not. Rather, the disappointment is more a sense that even if the homeless party had prevailed—or now that the homeless party has indeed prevailed—the fundamental nature and scope of involuntary homelessness as a social and moral problem would remain insufficiently addressed.

This is of course not to criticize the legal advocates for the homeless or their strategies. Those advocates operate within the constraints of the interpreted Constitution, including what is missing as well as what is present. Their incentives are mainly to litigate, at a constitutional level, claims on which they have at least some chance of prevailing. Advocates on behalf of the homeless have, as we shall see,[127] displayed great and responsible creativity in bringing a wide range of constitutional claims on behalf of the homeless, in a wide variety of circumstances.[128]

Several of the more common types of constitutional claims, based ultimately on liberty or equality, are illustrated below.[129] But the theme of the typically limited significance of either victory or defeat in constitutional homelessness cases can just as well be introduced by considering a particular case involving the homeless, but not directly involving any rights, crucial or trivial, of the homeless themselves.

This case, *Fifth Avenue Presbyterian Church v. City of New York*,[130] involved a claim by the Church that, pursuant to section 1983, New York City violated their free exercise of religion.[131] The Church argued successfully that their efforts to carry out their religious mandate "to care for the least, the lost, and the lonely of this world"[132] fell within the scope of ministry protected by the Free Exercise Clause.[133] The City's argument had been that the Church's

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[127] *See infra* Part IV.

[128] Many, if not all, of these claims, on various constitutional theories, partake of either liberty or equality. *See id.* But if someone wants to conclude that some constitutional arguments on behalf of the homeless have only a tenuous connection to liberty and equality, we need not raise any serious objection.

[129] *See infra* Part IV.

[130] 293 F.3d 570 (2d Cir. 2002).

[131] *Id.* at 575.

[132] *Id.* at 574–75.

[133] *See id.* at 575–76 (likelihood of prevailing on the merits standard for a preliminary injunction against the City).

activity in this case did not amount to a "meaningful provision of 'services'"[134] and therefore did not constitute protected religious conduct.[135]

Whatever the broader mission and ministry of the Church toward the homeless, however, in this case, the only activity involved was the Church's allowing homeless persons to sleep outdoors, unprotected by shelter from the elements, on Church property, during the month of February in New York City.[136] In a sense we can easily understand the City's ordinary police power concern for this "outdoor sanctuary"[137] program. It seems easy enough to characterize the Church's practice, by itself, as "providing inadequate shelter"[138] as opposed to some assumed "safer, more civilized alternative,"[139] as the City argued.

But from the standpoint of many of the homeless, a legal victory in this case for either the Church or the City would have left them in fundamentally unchanged circumstances. If the City's own, or any private shelter system had been generally thought to be better, overall, than sleeping outdoors on Church property on a February night, presumably most involuntarily homeless persons could have been so persuaded.[140] Of course, mental illness or impaired decisionmaking may take its toll in such cases.[141] But some homeless persons

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[134] *Id.* at 574.
[135] *Id.*
[136] *Id.* at 572.
[137] *Id.* at 574.
[138] *Id.* at 576.
[139] *Id.*
[140] *See id.*
[141] *See, e.g.*, Jones v. City of L.A., 444 F.3d 1118, 1123 (9th Cir. 2006) (citing Institute for the Study of Homelessness and Poverty report finding mental illness in one-third to one-half of Los Angeles homeless persons); NATIONAL COALITION FOR THE HOMELESS, WHY ARE PEOPLE HOMELESS? 6 (June, 2007), http://www.nationalhomeless.org/publications/facts/Why.pdf ("Approximately 16% of the single adult homeless population suffers from some form of severe and persistent mental illness."); Hemmy So, *Homeless Families Find Little Shelter, Study Says*, L.A. TIMES, May 20, 2006, 2006 WLNR 8674655 (finding that "[o]ne-third of the [homeless] heads of household experienced substance abuse, mental illness or both"). This is not to establish the role of mental illness in causing or in the solution to the problem of homelessness. *See* Florence Wagman Roisman, *The Lawyer as Abolitionist: Ending Homelessness and Poverty in Our Time*, 19 ST. LOUIS U. PUB. L. REV. 237, 246–47 (2000) (affordable subsidized housing as the most effective response to homelessness even among mentally ill persons). Nor is this to deny the value of more effective mental health treatment for homeless persons. *See, e.g.*, ECONOMIC ROUNDTABLE & INSTITUTE FOR THE STUDY OF HOMELESSNESS AND POVERTY AT THE WEINGART CENTER, 10-YEAR STRATEGY TO END HOMELESSNESS: PUBLIC DISCUSSION DRAFT 15 (June 11, 2004), http://www.bringlahome.org/docs/Strategy_to_End_Homelessness.pdf.

may reject the realistically available shelter alternatives based on understandable grounds,[142] even where such alternatives exist.[143]

We can in any event say that whoever prevails in this and similar cases, the practical circumstances of the homeless remain fundamentally the same. In this case, homeless persons, admittedly, did not even comprise a litigating party. But we should be under no illusions. Where homeless persons are the principal parties, constitutional litigation of all sorts, civil and criminal, whether as plaintiff or as defendants, and whether won, lost, or settled, tends to be of little consequence for the crucial underlying respects in which responsible persons would care about homelessness.

This is again not to minimize the achievements of legal advocates for the homeless. Those advocates appreciate keenly the constraints their constitutional litigation typically faces. We mean simply to illustrate the realistic impact of the general absence of a constitutional sense of fraternity or solidarity, along with the awkward fit of the concepts of liberty and equality with the basic problem of homelessness.

Constitutional litigation on behalf of the homeless has taken up a number of themes, individually and in combination. A partial listing could include the following: a right to travel,[144] interstate or intrastate, or to not travel; freedom of

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[142] *See, e.g.*, the sources cited *supra* note 13; Jane B. Baron, *Homelessness as a Property Problem*, 36 URB. L. 273, 278 (2004) ("Given the mean reality of shelter life, a rational person could sensibly choose the alternative difficulties of surviving in public spaces.").

[143] Indoor shelter, no matter how categorically preferred officially, may simply not be realistically available or affordable for many homeless persons. *See, e.g.*, So, *supra* note 141 ("Less than a quarter of homeless families in Los Angeles County can find beds at emergency shelters on any given night."). *See also* Jones v. City of L.A., 444 F.3d 1118, 1122 (9th Cir. 2006) ("For the approximately 11,000–12,000 homeless individuals in Skid Row, space is available in SRO hotels, shelters, and other temporary or transitional housing for only 9,000 to 10,000, leaving more than 1,000 people unable to find shelter each night. In the County as a whole, there are almost 50,000 more homeless people than available beds.") (citations omitted).

[144] *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551, 15–83 (S.D. Fla. 1992) ("[A]rresting the homeless for the harmless acts which they are forced to perform in public infringes on their fundamental right to travel."); Tobe v. City of Santa Ana, 892 P.2d 402, 423 (1995) (local prohibition on 'camping' or storing possessions on public streets or parks as not violative of any protected right to travel). *See also* Betancourt v. Bloomberg, 448 F.3d 547, 554, 555 n.** (2d Cir. 2006) (Calabresi, J. dissenting). For discussion, see Paul Ades, Comment, *The Unconstitutionality of 'Antihomeless' Law: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595, 609–13 (1989) (discussing lower court opinions extending interstate to intrastate travel rights); Nan S. Ellis & Cheryl M. Miller, *Welfare Waiting Periods: A Public Policy Analysis of* Saenz v. Roe,

speech claims and related overbreadth claims;[145] privacy and unreasonable search and seizure claims and defenses;[146] state constitutional unenumerated rights and substantive due process claims;[147] cruel and unusual punishment claims and defenses;[148] the possible applicability of a "necessity" defense to

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11 STAN. L. & POL'Y REV. 343, 349–51 (2000) (skeptical of any need for durational residency requirements given disparities among states in welfare benefit provision).

[145] *See, e.g.*, Clark v. Community For Creative Non-Violence, 468 U.S. 288, 298–99 (1984) (upholding park regulation prohibiting a "tent city" protest against homelessness as a supposedly content-neutral regulation of symbolic speech); Gresham v. Peterson, 225 F.3d 899, 905–09 (7th Cir. 2000) (regulation of public street begging and prohibition of "aggressive panhandling" upheld as supposedly content-neutral restriction of speech and as not unconstitutionally vague); Loper v. New York City Police Dep't, 999 F.2d 699, 704–05 (2d Cir. 1993) (distinguishing subway begging case and enjoining enforcement of broad prohibition of public loitering for purposes of begging; noting that "[b]egging frequently is accompanied by speech indicating the need for . . . shelter . . . . "); Kreimer v. Bureau of Police, 958 F.2d 1242, 1264 (3d Cir. 1992) (library rules against offensive hygiene/nuisance upheld under free speech challenge as narrowly tailored to serve significant government interests while leaving available ample alternative channels of communication); Armstrong v. D.C. Public Library, 154 F. Supp. 2d 67, 77–79 (D.D.C. 2001) (free speech right-to-receive information violated by library's denial of access based on subjective "objectionable appearance" standard as opposed to more objective "nuisance" test) (regulation held vague and overbroad); People v. Griswold, 821 N.Y.S.2d 394, 402 (2006) (trial court holding City's anti-aggressive panhandling rule unconstitutional on first amendment grounds when applied to defendant "merely standing on the sidewalk, passively and silently, holding a handwritten sign that said simply, 'Homeless. Hungry. Please Help'"); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1032 (9th Cir. 2006) (non-commercial food distribution to poor homeless in public spaces may or may not amount to protected speech or expression under an as-applied challenge).

[146] *See, e.g.*, *Pottinger*, 810 F. Supp. at 1572–74 (finding certain seizures of homeless persons' personal property to have been unlawful, but also finding, on a sort of inescapably mechanical logic, no privacy rights violation, as "where plaintiffs are in the unfortunate position of having to perform certain life-sustaining activities in public, this court has difficulty finding that they have a reasonable expectation of privacy in those activities"). Thus, the more desperate and abject one's circumstances, the fewer one's privacy rights. The early stage litigation was also discussed in the property seizure and destruction case of *Kincaid v. City of Fresno*, No.1:06-CV-1445 OWW SMS, 2007 WL 833058 (E.D. Cal. March 19, 2007).

[147] *See, e.g.*, Moore v. Ganim, 660 A.2d 742, 750 (1995) (finding, under several state constitutional provisions, "no governmental obligation to provide minimal subsistence. . . to the poor"). For critique, see Andrew J. Liese, Note, *We Can Do Better: Anti-Homelessness Ordinances as Violations of State Substantive Due Process Law*, 59 VAND. L. REV. 1413 (2006).

[148] *See, e.g.*, *Tobe*, 892 P.2d at 1166 (focusing on question of controllability or involuntariness of the status); Joel v. City of Orlando, 232 F.3d 1353, 1361 –62 (11th Cir. 2000) (no violation of Eighth Amendment Cruel and Unusual Punishment Clause prohibition against punishing defendant's status, as opposed to defendant's conduct, as no involuntary behavior was criminalized where shelter space had always been available and no one had been turned away from the shelter); *Pottinger*, 810 F. Supp. at 1565 ("[A]s the homeless plaintiffs do not have a

certain criminal charges;[149] equal protection claims;[150] as well as procedural due process and vagueness[151] claims and defenses.

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single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the Eighth Amendment—sleeping, eating, and other innocent conduct"); *Jones*, 444 F.3d at 1128–29, 1128,1138 (no shelter space available suggests a 'status' rather than 'conduct' classification; cruel and unusual punishment claim may be based upon operation of the criminal process well before any actual criminal conviction); Benson v. City of Chi., No. 06 C 1123, 2006 WL 2949521, at *2–*3 (N.D. Ill. Oct. 12, 2006) (distinguishing *Jones* as the ordinance in *Benson* required that the defendant leave the real property of another when notified to do so, leaving open the possibility of not being similarly notified to leave after the homeless person has been required to move elsewhere, once or on multiple occasions); Johnson v. City of Dallas, 61 F.3d 442, 444–45 (5th Cir. 1995) (homeless persons not yet convicted under public sleeping ordinance lack standing to bring Eighth Amendment Cruel and Unusual Punishment claim); D'Aguanno v. Gallagher, 50 F.3d 877, 879 n.2 (11th Cir. 1995) (cruel and unusual punishment clause protects only convicted persons). For commentary, see, for example, Benno Weisberg, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the* Robinson *Doctrine to Homelessness and Other Contextual "Crimes,"* 96 J. CRIM. L. & CRIMINOLOGY 329, 330–31 (2005) (seeking to focus not on status versus conduct, an often realistically meaningless distinction, but between innocent conduct and culpable conduct, which may also be controversial); Donald E. Baker, *"Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless*, 45 U. MIAMI L. REV. 417 (1991). Our broader point is that litigation that succeeds in avoiding the criminalization of involuntary homelessness, however appreciated, leaves the most basic moral and social realities essentially unchanged.

[149] *See, e.g.*, *Jones*, 444 F.3d at 1130–31 ("A criminal defendant may assert a necessity defense if he has committed an offense to prevent an imminent harm that he could not otherwise have prevented."); *see also* Antonia K. Fasanelli, Note, In re Eichorn: *The Long Awaited Implementation of the Necessity Defense in a Case of the Criminalization of Homelessness*, 50 AM. U.L. REV. 323 (2000). More generally, see R. GEORGE WRIGHT, DOES THE LAW MORALLY BIND THE POOR?: OR WHAT GOOD'S THE CONSTITUTION WHEN YOU CAN'T BUY A LOAF OF BREAD? 102–74 (1996) ("Desperation and Necessity: Les Miserables On Trial").

From our perspective, the necessity defense doctrine presents two major problems. First, the requirement that the homeless defendant not have significantly contributed to his or her own exposure to the elements may sometimes be met, but in others, essentially similar cases, will not. Sometimes, a homeless person may literally miss the last bus, for one reason or another. To convict some homeless persons, but not other homeless persons essentially similarly situated, may be doctrinally sound, but in the broader scheme of things seems to involve a breach of the constitutionally missing value of fraternity or solidarity. And again, even successfully invoking the necessity defense to various charged crimes does not fundamentally address the basic moral status of involuntary homelessness and of homeless persons.

[150] *See, e.g.*, *Joel*, 232 F.3d at 1357–59 ("Homeless persons are not a suspect class, nor is sleeping out-of-doors a fundamental right.") (citing *D'Aguanno*, 50 F.3d at 879 n.2); *id.* at 1358–59 (mere disparate impact on homeless persons evokes only minimum equal protection scrutiny; ordinance in question held to "promote aesthetics, sanitation, public health, and safety"); *Kreimer*, 958 F.2d at 1269 n.36 (to similar effect); *Pottinger*, 810 F. Supp. at 1578–79 (no grounds for equal protection heightened scrutiny or any fundamental rights claim). For

As well appreciated as all of this litigation deserves to be, the stark limitations of this litigation even at its most successful are plain.[152] Universal access to shelter from the elements, whether in public, subsidized private, or even religiously-affiliated facilities, is rarely in direct issue. The health, safety, or privacy of indoor shelters is for one reason or another similarly left on the back burner. Instead, courts divide over whether restrictions on various forms of speech by homeless persons should count as content-based or content-neutral, typically without serious argument for either result.[153] The privacy expectations of persons who must perform virtually all bodily activities in public are debated.[154] Whether the elemental activities of homeless persons should count as manifestations of a status, or as conduct, is debated.[155] Whether the

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critical discussion, see Jennifer E. Watson, *When No Place is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501 (2003). Again, much of the standard equal protection focus, in the absence of a concern for fraternity and solidarity, vaguely misses the mark in addressing homelessness. Equality itself is hardly the basic concern, in any substantive sense. Involuntarily homeless persons are typically not immutably homeless. Often, nothing about them contributing to their homelessness is immutable. And the idea that typical involuntarily homeless persons would want to assert a fundamental right to be chronically without shelter free of criminal prosecution, as opposed to simply gaining access to minimal shelter, is simply unrealistic.

[151] *See Pottinger*, 810 F. Supp. at 1575; *Joel*, 232 F.3d at 1359–60 ("Joel's facial challenge . . . on vagueness grounds must necessarily fail because his conduct was clearly within the scope of the ordinance's prohibition against sleeping out-of-doors on public property.") (rejecting as-applied challenge as well); *Betancourt*, 448 F.3d at 553 ("An ordinary person would understand that an agglomeration of boxes large enough for a man to fit into would be 'something that obstructs or impedes.'").

[152] *See* Jane B. Baron, *Homelessness As a Property Problem*, 36 URB. L. 273, 273 (2004) (noting the irony of constitutional litigation aimed essentially at allowing the homeless a somewhat greater permitted range of activities while remaining homeless). It is certainly possible to argue that winning a right to be somewhat more visible or more conspicuous to the broader citizenry will expedite the eventual abolition of involuntary homelessness. Whether such incremental legal victories might also provoke hostility, or policies that simply increase the invisibility of the homeless, or that have no significant effect, is presumably an empirical question. In any event, to see a homeless person as in this respect analogous to the sort of "broken window" or untended graffiti that bespeaks a breakdown in social control is perverse. A homeless person is a dignified person first, and a supposed symbol of anything second. For a sense of the stark limits of a compromise or modus vivendi between the homeless and public authorities, see, e.g., the district court's idea of two local "safe zones" where homeless persons could be free from arrest for harmless activities in *Pottinger v. City of Miami*, 40 F.3d 1155, 1156 (11th Cir. 1994).

[153] *See* the cases cited *supra* note 145.

[154] *See* the cases cited *supra* note 146.

[155] *See* the cases cited *supra* note 148.

homeless person has meaningfully contributed at some point to her own desperation is scrutinized.[156]

Somewhat more broadly put, the emphasis in litigation tends to be on whether homelessness itself, or the basic activities associated with homelessness, can be criminalized, and if so, on what procedural terms and conditions.[157] From the standpoint of the basic objectionability of widespread involuntary homelessness, these legal stakes seem unduly modest. Legal victories of this sort won by the homeless seem tangential to the overall scheme of things. This state of affairs, however, is less surprising when we remember the general absence of any sort of fraternalist element, universal in scope, to complement the Constitution's less relevant references to liberty and equality.

V. CONCLUSION: SOME STRUCTURAL PROBLEMS AND THE CONTINUING NEED FOR FRATERNITY

We do not mean to suggest that homelessness on a large scale is entirely a matter of the constitutional absence of fraternity or solidarity, or a general antipathy for redistributive "positive" rights. We should instead acknowledge some of the complications that would await any meaningful public or private attack on the problem of homelessness.

Even a brief survey reveals some serious complications. Homelessness has a range of causes,[158] some more important than others.[159] Homelessness has a range of victims, including families; the old and the very young; and workers and those variously unable to work.[160] No solution to homelessness that does not accommodate these basic complications can be viable.

The structure of housing markets also differs dramatically from that of the markets for other vital necessities, including the consumer markets for food and

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[156] *See* the cases cited *supra* note 149.

[157] *See supra* notes 148–51. *See also* NATIONAL COALITION FOR THE HOMELESS, A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 16–18 (2006), http://www.nationalhomeless.org/publications/crimreport/report.pdf (listing anti-panhandling ordinances; anti-camping or anti-sleeping measures; anti-loitering measures; sweeps; curfews; and restrictions on food distribution to homeless persons).

[158] *See, e.g.*, NATIONAL COALITION FOR THE HOMELESS, *supra* note 141.

[159] *See* Roisman, *supra* note 141, at 246–47 (emphasizing the importance of subsidized housing). More generally, see Roisman, *supra* note 5.

[160] *See, e.g.*, NATIONAL COALITION FOR THE HOMELESS *supra* note 141; ECONOMIC ROUNDTABLE & INSTITUTE FOR THE STUDY OF HOMELESSNESS AND POVERTY AT THE WEINGART CENTER, *supra* note 141.

even for basic health care. Housing is, relatively, non-divisible. It is supplied typically in substantial, more or less predetermined "chunks." Adjusting one's personal demand for housing over the short term can be possible. But such adjustments, in light of changing financial circumstances, are typically not smoothly continuous or themselves costless. As Jonathan Kozol has observed, by contrast with housing, "one can rapidly and drastically adjust one's food consumption."[161] Or more dramatically, being unable to afford to buy food on one day typically does not raise the cost of buying food the next day. But consider the transaction costs, and the possible loss of credit standing, associated with eviction or otherwise losing one's residence. If we then include the possible additional costs of deposits with lessors or utilities, "[t]he cost of losing housing and then paying for re-entry into the housing system . . . is very high. . . ."[162]

More generally, rising housing market and other land use values may be a financial benefit to some, while creating increased difficulties for those with the least income to devote to housing.[163] Our federal system[164] means that whatever in this regard the federal government cannot efficiently do, or chooses not to undertake, is left to the states, to smaller governmental units, and to the private and charitable sector.[165]

Certain problems exist at the federal level, but seem even more intractable at other levels. There are thus inherent advantages and disadvantages to both

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[161] JONATHAN KOZOL, RACHEL AND HER CHILDREN: HOMELESS FAMILIES IN AMERICA 13 (1988).

[162] *Id.*

[163] For discussion, see Editorial, *Finding a Way Home: Our City, Our Duty*, L.A. TIMES, 4 Mar. 5, 2006, at M4.

[164] For discussion, see, for example, Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987).

[165] Problems and possibilities related to a preference for federalism and localism, including private initiatives, are sometimes discussed under the doctrinal rubric of 'subsidiarity.' *See, e.g.*, Francis J. Schweigert, *Solidarity and Subsidiarity: Complementary Principles of Community Development*, 33 J. SOCIAL PHIL. 33 (2002); Neil MacCormick, *Democracy, Subsidiarity, and Citizenship in the "European Commonwealth,"* 16 LAW. & PHIL. 331 (1997). The idea of subsidiarity itself implies that the lower levels of community may in certain contexts be incapable for various reasons of promoting the development of their members. See Joseph P. Rompala, Note, *"Once More Unto the Breach, Dear Friends": Recurring Themes in Welfare Reform in the United States and Great Britain and What the Principle of Subsidiarity Can Do to Break the Pattern*, 29 J. LEGIS. 307, 331–32 (2003). For a compilation of private sector; public-private; and local, state, and federally-focused homelessness initiatives, see Interagency Council on Homelessness, Innovative Initiatives (2005), http://www.ich.gov/innovations/index.html.

concentrating[166] and dispersing[167] homeless facilities and services, but the familiar "not in my backyard" local resistance syndrome may attend both.[168] As well, private charitable action may be underfunded, unsystematic or less than universal in scope, and hit or miss in application.[169] But even governmental state and local poor relief tends to be both limited and parochial in the sense of seeking to provide fewer benefits to "outsiders" as opposed to "home-grown" charitable cases.[170]

What may seem like sheer parochialism or arbitrary exclusion of outsiders may also reflect a strategic desire on the part of neighboring communities to avoid making their own local expenditures on the homeless, and specifically to "free ride" or to externalize and export those costs onto other jurisdictions. It is reported that in Los Angeles County, for example, "only 25 of 88 cities . . . spend money on housing and services for the homeless."[171] In the absence of meaningful requirements imposed from above, local cities may face strong incentives to ride free on the presumed efforts of others. The tendencies toward undersupply of homeless services follow inescapably. And even within a narrow political jurisdiction, particular institutions and agencies may face

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[166] *See* Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1115–18 (2005) ("[A] homeless campus is a classic 'LULU' (locally undesirable land use)" provoking NIMBYist or "not in my backyard" local reactions.).

[167] Cara Mia DiMassa, *L.A. County OKs 'Historic' Homeless Plan*, L.A. TIMES, April 5, 2006, at A1 (proposal to de-concentrate homeless services into five centers across the county).

[168] *See supra* notes 166–67. For further discussion of the NIMBY syndrome in an unrelated context, see Michael E. Kraft & Bruce B. Clary, *Citizen Participation and the NIMBY Syndrome: Public Response to Radioactive Waste Disposal*, 44 W. POL. Q. 299 (1991).

[169] For a concrete sense of the occasional myopia, arbitrariness, and less than universal sweep of even well-intended private charity, consider the several benefactors depicted in CHARLES DICKENS, BLEAK HOUSE (Penguin Books ed. 1996) (1853). For a more theoretical discussion from a Dickens contemporary, see JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY, book V, ch. 11, at 43–48 (Longmans, Green 7th ed. 1909) (1848).

[170] *See* William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millenium Resemble English Poor Law of the Middle Ages*, 9 STAN. L. & POL'Y REV. 101, 101 (1998). For the major constitutional cases, see *Shapiro v. Thompson*, 394 U.S. 618 (1969) (one year durational residence requirement); *Saenz v. Roe*, 526 U.S. 489 (1999) (limiting benefits to those available in applicants' former state of residence).

[171] Gary Blasi et al., *5 Steps to Get Out of Skid Row*, L.A. TIMES, Dec. 31, 2006, at M4, 2006 WLNR 22749649. For some general background, see, for example, Richard J. Arneson, *The Principle of Fairness and Free-Rider Problems*, 92 ETHICS 616 (1982).

incentives to physically "dump" homeless persons elsewhere, if not outside the local political jurisdiction.[172]

Funding services for homeless persons must in addition survive the battle against competing and more politically potent demands for public funds.[173] Attempting to narrow the class of those compelled to directly support homeless services may only enhance the intensity of the lobbying and interest group problems involved.[174] Almost by definition, the homeless themselves are poorly placed to dispense meaningful rewards or punishments within the electoral and political systems at any level.[175]

An important implication of these structural problems is that an effective and equitable solution to the problem must be not only jurisdictionally broad, but genuinely fraternal, solidaristic, and universal in its scope. Imagine a local jurisdiction that is contemplating an attempt to raise local funds to resolve the local problem of homelessness in its current scope and magnitude. The effort might well be abandoned under the combined threats of NIMBYism;[176] resistance, if not jurisdictional flight, by any distinctive sources of tax funding;[177] and fear of exploitation and free-riding by other jurisdictions.[178] Homeless persons elsewhere can respond to incentives. By a sort of loose analogy to the phenomena of moral hazard[179] and adverse selection,[180] the

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[172] *See, e.g.*, Randal C. Archbold, *Bill Takes on "Dumping' of Homeless by Hospitals*, N.Y. TIMES, Feb. 23, 2007, at A12. ("Advocates for the homeless said it was common in many cities for homeless people still requiring medical treatment to end up on the street or at the doors of shelters ill prepared for their medical needs.").

[173] See Ken Kusmer, *Homeless Funding Falls in Indiana*, INDIANAPOLIS STAR, Apr. 23, 2007.

[174] *See id.*

[175] This is not to suggest that homeless persons or the poor in general have been recognized as an equal protection class triggering any heightened judicial scrutiny of adverse legislation. *See generally* Dandridge v. Williams, 397 U.S. 471 (1970).

[176] *See supra* notes 166–68 and accompanying text.

[177] *See supra* note 163. Note also the parallel fears, state rivalries, and incentives resolved by an overarching federal statute in the state unemployment compensation tax case of *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

[178] *See id.*

[179] For definitions, see A Dictionary of Economics, Oxford Reference Online, http://www.oxfordreference.com/views/ENTRY.html (last visited Nov. 23, 2006); A Dictionary of Business and Management, Oxford Reference Online, *available at* http://www.oxfordreference.com/views/ENTRY.html (last visited Nov. 29, 2006).

[180] For definitions, see the sources cited *supra* note 179. For discussion in a somewhat different context, see, for example, MARK V. PAULY, ADVERSE SELECTION AND MORAL HAZARD: IMPLICATIONS FOR HEALTH INSURANCE MARKETS (2006),

availability in a given location of dignified, humane, and fraternal treatment for the homeless might attract homeless persons from other jurisdictions.[181] This could conceivably further raise costs to our hypothetical relatively fraternal jurisdiction, and perhaps reduce costs elsewhere. Hence the need for a more broadly jurisdictionally based fraternalism. The broader and more inclusive the scope of the jurisdictions participating,[182] the lower the likelihood that potential solutions to the problem of homelessness will be inadvertently sabotaged by phenomena such as self-seeking and free-riding.[183]

Unfortunately, merely recognizing that broad jurisdictional genuine fraternity would be required to solve the basic problem of homelessness does not itself create that fraternity. There can be no guarantee that solving the problem of involuntary homelessness will be in the direct and immediate financial interests of all taxpayers. Whether the increased spending will be invariably fully offset by new efficiencies, and less reliance on expensive emergency or stop-gap measures, is an empirical matter. We can say, though, that no such universal solution is likely to arise merely from increasing societal wealth and the play of market forces. Some element of broad-ranging fraternity, constitutionally realized, constitutionally stabilized, and constitutionally assured, will be necessary as well.

Once that sufficient degree of broad-jurisdictional universalist fraternity exists, however, the solution to homelessness will be less of a purely legal or even constitutional matter than it may now appear to be. Fraternity is hardly reducible to indifferently regarded official words on paper. Consider the

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http://www.oberlin.edu/economic/Papers/HealthConf/.

[181] By analogy, the Court in *Shapiro v. Thompson* did not deny that the availability of more generous welfare benefits could, like employment or a pleasant climate, attract out-of-staters in some number; the idea was rather that officially seeking to discourage entry on such grounds is generally constitutionally illegitimate. *See* Shapiro v. Thompson, 394 U.S. 618, 629 (1969). We need take no position on the actual strength of any range of such incentives, or their effects on local spending, in the homelessness context.

[182] This is not to disparage the subsidiarity value, *see supra* note 165 and accompanying text, or of sensible policy adaptation to distinctive local culture and circumstance.

[183] Note that it is generally thought that genuine "race to the bottom" problems, as well as the classic liberal problem of our safe emergence into society from a hazardous assumed state of nature, typically require an encompassing, broadly inclusive solution changing the various actors' incentives. For critical discussion, see Steven D. Schwinn, *Toward a More Expansive Welfare Devolution Debate*, 9 LEWIS & CLARK L. REV. 311, 3234–25 (2005); Note, *Devolving Welfare Programs to the States: A Public Choice Perspective*, 109 HARV. L. REV. 1984, 1986–87 (1996); DAVID P. GAUTHIER, THE LOGIC OF LEVIATHAN: THE MORAL AND POLITICAL THEORY OF THOMAS HOBBES (1969); JEAN HAMPTON, HOBBES AND THE SOCIAL CONTRACT TRADITION (reprint ed. 1988).

contrast between constitutionalized liberty or equality on the one hand and the idea of fraternity on the other. It is possible for us to enjoy constitutional liberty, as in the case of the freedom to assemble and speak, despite a certain indifference or even hostility on the part of the executive branch of the government.[184] Similarly, it is possible to enjoy equality with regard to a given constitutional right, say, in the weight accorded one's electoral vote, despite legislative branch indifference or even hostility.[185]

Genuine fraternity, however, of the sort required for a universal solution to the large scale problem of involuntary homelessness, works a bit differently. Fraternity is not entirely a matter of official words on paper or even of outcomes or results. Fraternity also has a dimension of genuine, as opposed to the mere appearance of, concern and identification. Fraternity thus has a certain subjective or motivational element that is not usually subject to direct measurement and command by the law. The law can command us to appear to care, but not so readily and immediately to actually care.[186] If we do not genuinely care fraternally, we are not likely to be motivated to change the law so that we merely appear to be fraternal, or even to change the law in ways that might eventually make us actually more fraternal. Once we do genuinely fraternally care sufficiently, however, for whatever reason, the above practical

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[184] Note the more or less practical constraints on bias built into a march permitted by *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992).

[185] Note the Court's willingness to strike down, as violative of equal protection, legislative district voting strength disparities of as little as 0.7 percent, as in *Karcher v. Daggett*, 462 U.S. 725 (1983).

[186] The law could, in theory, command and actually carry out a genuine solution to the problem of homelessness even where we did not feel fraternal toward the homeless. But if we did not feel sufficient fraternity, it is unclear what other motives not related to fraternity, including dignity, could realistically suffice. Mere subjective distress, or the aesthetic unattractiveness of homelessness, can provide motives, but both of these concerns can often be alleviated more cheaply by merely removing the homeless from public view. For a reference to Lord Keynes' aesthetic distaste for poverty in general, see James K. Galbraith, *The Importance of Being Sufficiently Equal, in Should Differences in Income and Wealth Matter?* 201 (Ellen Frankel Paul, Fred D. Miller & Jeffrey Paul eds. 2002). And there is no guarantee that universally eradicating homelessness would leave all taxpayers at least as well off as before. Basic housing may be less expensive than jail or in-patient medical treatment, but more expensive than leaving the homeless more or less unnoticed to fend for themselves, or leaving the homeless to some other jurisdiction. For a recent survey, see Will Higgins, *Study: House the Homeless to Cut Costs*, INDIANAPOLIS STAR, June 19, 2007, *available at* http://www.indystar.com/apps/pbcs.dll/article (visited June 20, 2007) (discussing three year study of 96 Indianapolis homeless persons conducted by Professor Eric Wright). For further discussion of this issue, see generally the Indiana Coalition for Homelessness Intervention and Prevention website at http://www.chipindy.org.

obstacles[187] to overcoming homelessness become more manageable. With sufficient fraternity, these obstacles become mainly problems of coordination and of reasonable good faith sharing of burdens, and the outlook for the homeless genuinely brightens.

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[187] See *supra* notes 161–83 and accompanying text.